IN THE

Supreme Court of the United States

OCTOBER TERM, A.D. 1961

No. 324

ELGIN, JOLIET AND EASTERN RAILWAY COMPANY,
a corporation,

Petitioner,

vs.

RAPHAL BORRERO and JOSE GONZALES GOMEZ,

Respondents.

PETITION FOR REHEARING OF ORDER DENYING CERTIORARI.

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Your petitioner, Elgin, Joliet and Eastern Railway Company, respectfully petitions for a rehearing of the order of October 23, 1961, denying certiorari in the above entitled cause.

Petitioner limits its motion for reconsideration of the denial of its petition for writ of certiorari to the second question presented by the petition—the error in setting up

the straw man of assumption of risk to becloud the basic issue of comparative negligence. Upon that issue we respectfully direct the attention of this Court to the decision of the Supreme Court of Utah in *Siciliano* v. *Denver & R. G. W. Co.*, 364 P. 2d 413, published in the advance sheet of September 29, 1961, after the petition and opposing brief in this case had been filed.

In *Siciliano* as here, it appears that "defendant urges that the court erred in giving an objected to instruction that plaintiff did not assume any risk in his employment" (364 P. 2d at 414). The Supreme Court of Utah held (364 P. 2d at 414):

> "As to the contention that it was prejudicial error to instruct the jury as to assumption of risk, we agree. No issue was raised by defendant's pleading on that score, and there was no evidence that remotely could have suggested that assuming the risk would have prevented recovery here. Nor would have been proper an instruction on assumption of risk had this been a case divorced from the F.E.L.A. (which specifically eliminates such defense), since the evidence showed conclusively that Siciliano had no knowledge of any hazard, such knowledge being a necessary factor before assumption of risk can be urged as a defense."

The court referred to its earlier decisions in *Bruner* v. *McCarthy*, 105 Utah 399, 142 P. 2d 649, and *Moore* v. *Denver & R. G. W. R. Co.*, 4 Utah 2d 255, 292 P. 2d 849, 852, disapproving such an instruction, and to *Ellis* v. *Union Pacific R. Co.*, 148 Neb. 515, 27 N.W. 2d 921, and continued (364 P. 2d at 415):

> "The coup that seems to have led to the disapproval of the instruction in F.E.L.A. cases, was executed by Mr. Justice Frankfurter in his concurrence in *Tiller* v. *Atlantic Coast Line R. Co.*, (318 U.S. 54, 63 S. Ct. 444, 453, 87 L. Ed. 610) when he said:

> '"Assumption of risk" as a defense where there is negligence has been written out of the act. But "assumption of risk", in the sense that the employer is not liable for those risks which it could not avoid in the observance of its duty of care, has not been written out of the law. Because of its ambiguity the phrase "assumption of risk" is a hazardous legal tool. As a means of instructing a jury, it is bound to create confusion. It should therefore de discarded.'
>
> "This language was referred to and applied in *Texas & Pac. Ry. Co.* v. *Buckles.* (5 Cir., 232 F. 2d 257)
>
> "In order to serve as a guide for instructions on assumption of risk in F.E.L.A. cases, we state that in the usual case it is prejudicial error to instruct that under the act the employee does not assume the risks of his employment occasioned by the employer's negligence, unless, as Mr. Justice McDonough pointed out in the *Moore* case, such issue was raised by the pleadings and evidence,—and we might add unless raised by the pleadings *or* evidence. There may be a case where the issue was not pleaded but where the evidence so emphasizes the fact that the employee recklessly and foolishly took on a known and dangerous hazard as to 'create improper inferences' that should be 'dispelled' by a cautionary instruction, as reflected in the language of Mr. Justice McDonough."

The decision of the Appellate Court of Illinois here is squarely in conflict with these decisions of the Supreme Courts of Utah and Nebraska, and with the very recent decision of the Court of Appeals for the Third Circuit in *Seaboldt* v. *Pennsylvania R. Co.* (C. A. 3), 290 F. 2d 296, cited at p. 17 of the petition. The "reasoning" by which the court below sought to sustain the challenged instruction is squarely in conflict with the considered statement of the

Court of Appeals for the Second Circuit in *Murray* v. *New York, N. H. & H. R. Co.* (C. A. 2), 255 F. 2d 42, at 44, that:

> "The trial judge was apparently of the view that the rule tended only to show assumption of risk by the plaintiff, a defense which does not exist under the Act, 45 U.S.C.A. § 54. To some extent the doctrines of assumption of risk and contributory negligence overlap. See *Pacheco* v. *New York, N. H. & H. R. Co.*, 2 Cir., 1926, 15 F. 2d 467. The former 'refers to the situation in which the plaintiff, with full knowledge of the risk, enters into some relation with the defendant involving danger to himself through the defendant's conduct.' Prosser on Torts 377 (1941). Contributory negligence, on the other hand, consists of 'conduct on the part of the plaintiff which falls below the standard to which he should conform for his own protection * * *' Restatement of Torts § 463. As we have indicated above, we think that violation of Rule 745 by the plaintiff was some evidence from which the jury might determine that plaintiff was not in the exercise of due care in being aboard the engine. *The defendant may not be denied its partial defense of contributory negligence merely because the same evidence would be pertinent to prove assumption of risk.*" (Emphasis ours)

See also *Potter* v. *Brittan* (C. A. 3), 286 F. 2d 621.

The conflict between the decisions of state and federal courts sitting in Illinois and the decisions above referred to in other states and other circuits will not die down by being ignored. The instruction was challenged in three cases within eight months. Railroad defendants are keenly conscious of the fact that this instruction — this "hazardous legal tool," to quote Mr. Justice Frankfurter—is used to cut down their "partial defense of contributory negligence," as Judge Waterman puts it. Sooner or later this Court must face the question necessarily presented by this appeal: Does an instruction on assumption of risk have any place at all in an F.E.L.A. case. This Court has held

that "cases tried under the Federal Act [are] to be handled as though no doctrine of assumption of risk had ever existed" (*Tiller, supra*, p. 64). The jury, in its relatively simple duty "to weigh the fault of the injured employee and compare it with the negligence of the employer, and, in the light of the comparison, do justice to all concerned" (*Tiller, supra*, p. 65) should not be confused by the difficult concept of "assumption of risk."

The case at bar necessarily and squarely presents for decision the conflict which must inevitably be decided by this Court. We respectfully submit that the continuing conflict, presented by the three decisions in a space of eight months, should be resolved now.

Respectfully submitted,

HARLAN L. HACKBERT,

Attorney for Petitioner.

CERTIFICATE OF COUNSEL.

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the Rules of this Court.

HARLAN L. HACKBERT,

Counsel for Petitioner.